

Members

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Sen. Joseph Zakas
Sen. John Broden
Sen. Timothy Lanane
Rep. Linda Lawson, Vice-Chairperson
Rep. Ryan Dvorak
Rep. Kathy Richardson
Rep. Eric Koch
Chief Justice Randall Shepard
Thomas Felts
David Whicker
Kevin Kubash
Jacqueline Rowan



COMMISSION ON COURTS

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MEETING MINUTES¹

Meeting Date: October 24, 2008
Meeting Time: 1:30 P.M.
Meeting Place: State House, 200 W. Washington
St., Room 431
Meeting City: Indianapolis, Indiana
Meeting Number: 4

Members Present: Sen. Richard Bray, Chairperson; Sen. Timothy Lanane; Rep. Linda Lawson, Vice-Chairperson; Rep. Ryan Dvorak; Rep. Eric Koch; Chief Justice Randall Shepard; Thomas Felts; David Whicker; Jacqueline Rowan.

Members Absent: Sen. Joseph Zakas; Sen. John Broden; Rep. Kathy Richardson; Kevin Kubash.

Sen. Richard Bray, Chairperson of the Commission on Courts (Commission), called the meeting to order at 1:35 P.M.

Sen. Bray announced this meeting would be the Commission's final meeting of 2008. He said that the Commission would vote on findings and recommendations to include in the Commission's 2008 Final Report after taking testimony on several new topics.

The first person to testify was Mark Shublak representing Indiana Interactive, a subsidiary

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of NIC, Inc. He said Indiana Interactive has partnered with the State of Indiana for 13 years and serves as the network manager for "IN.gov," the State's official website. He stated they have developed, hosted, and maintained more than 200 online services for the State of Indiana.

Mr. Shublak said one of NIC's subsidiaries, Utah Interactive, partnered with the Utah Department of Commerce to launch what is called the State Construction Registry on May 1, 2005. Mr. Shublak stated the late Sen. David Ford introduced SB 257, which was based on this Utah law, during the 2008 session of the General Assembly. He said SB 257 would have created an online state construction registry supervised by the Office of Technology to allow for the electronic filing of mechanic's liens. Mr. Shublak said this bill passed the Senate but did not pass the House. He said there was interest in introducing similar legislation for the 2009 session. (Handout #1)

Mr. Shublak stated while this legislation is based on the Utah law, the Indiana legislation did not make any substantive changes to the Indiana mechanic's lien law, only procedural changes. He said the legislation would allow for the online filing of mechanic's liens in Indiana as of January 1, 2010.

Mr. Shublak said this registration procedure would be phased in incrementally and initially apply only to Class 2 residential structures. He said if there were issues related to the "race to the court house" to file liens, the online registry could made to operate only during courthouse business hours.

In response to questions from Commission members, Mr. Shublak stated the online registration of liens would take the place of filing liens in the recorder's office. Also, he said in Utah the liens could be mailed to a processing center and entered into the system by the recorder. He stated since the registry would initially contain only mechanic's liens, a standard title search would have to be conducted to discover other types of liens.

The next person to testify was Gretchen White of the Indiana Builders Association. Ms. White said the Association became interested in this online registry system after learning about the Utah law. She stated this system would allow for the uniform and transparent filing of liens and would allow for the information to be available in "real time" on the Internet. She said if this system was successful concerning mechanic's liens, it could be expanded to cover all liens.

In response to questions from Commission members, Mr. Shublak said for security purposes there would be a unique identifier assigned to each person who opened an Internet account and a unique identifier assigned to each lien filed. He said that if a person refused to release a lien filed online that legally should be released, the consequences would be the same for a person who refused to release a "paper version" of that lien.

Mr. Shublak also said the mechanic's lien records would be public records available to anyone who had Internet access. He said one of the goals of this system was to make filing liens less expensive. He said if there were concerns about the amount of the online filing fees, specific provisions could be included in the bill concerning these fees. Mr. Shublak also said the online filing system would only apply to mechanic's liens filed after a date certain.

Sarah Rossier, Deputy Legislative Director of the Association of Indiana Counties (AIC), then introduced Martha Breeze, Posey County Recorder, and Susie Misiniec, Johnson County Recorder, to testify in opposition to the proposed online mechanic's lien legislation.

Ms. Breeze stated residential liens made up the bulk of the mechanic's liens filed in her office. She said the system would not be as easy to use as simply getting on line and filing a lien. She said information would still have to be gathered in person at a recorder's office before a mechanic's lien was filed. She also stated that at a time when county governments need to be more efficient, this proposed system was not efficient. She said a title search would still have to be conducted for all other types of liens.

Ms. Misiniec stated the AIC and the Indiana Recordors Association opposed the online mechanic's lien legislation last year. She said she believed the system would be cumbersome and would slow commerce. She said many of the persons that would be affected by this system, including "mom and pop" operations and other small contractors, would not be well served by the system.

The next person to testify was Wendy Gibbons of the Indiana Land Title Association. Ms. Gibbons said she believed the online mechanic's lien legislation did make a substantive change to Indiana law because it altered the way these liens were recorded. She said the system could create unfair advantages and cause lien priority issues. She said she did support this use of technology if it applied to all documents, but to use it just for mechanic's liens was not efficient.

The next person to testify was Courtney Young from the Heating and Air Conditioning Alliance. Ms. Young stated the Alliance represented many small "mom and pop" operations. She said many of their members don't have computers, don't use e-mail, and wouldn't pay online filing fees by using a credit card. She said she didn't believe these changes should be made to existing law.

Sen. Bray then stated since there were so many unresolved issues concerning the proposed legislation and this was the final meeting of the Commission for the year, the Commission would take no further action concerning the online mechanic's lien registry at this time.

The next person to testify was Judge Gerald Zore of the Marion Superior Court. Judge Zore said Marion County needed additional magistrates because of its increasing caseload. He said the county now employed 27 commissioners. He said if all these commissioner positions were converted to state paid magistrate positions it would cost the State approximately \$2.5 million per year.

Judge Zore continued by stating the cost to the State could be offset by paying these magistrates using the juvenile magistrate formula under which the State was responsible for 60% of a magistrate's salary and a county was responsible for 40% of the salary. He said costs could also be offset by the imposition of a redocketing fee in Marion County.

In response to questions from Commission members, Judge Robert Altice of the Marion Superior Court stated a magistrate committee currently assigned magistrates to the various divisions of the Superior Court. He also stated a full-time commissioner paid by a county made much less than a full-time magistrate paid by the State.

Chief Justice Shepard then stated this issue concerned finance and tax policy as well as judicial administration. He stated imposing a redocketing fee in one county could exacerbate the statewide problem of whether state taxpayers or county taxpayers should pay for additional judicial officers in counties. He said the General Assembly had recently added more magistrates and judges in Marion County in response to a legitimate claim. He said it was important to design a statewide policy to address the need for additional judicial officers.

In response to questions from Commission members, Judge Altice said he was not opposed to eliminating the Marion County township small claims courts and adding more judges to the Superior Court. However, he said the township small claims courts currently handle about 75,000 cases per year.

In response to questions from Commission members, Glenn Lawrence, Marion County Court Administrator, said he estimated 2,000 to 5,000 cases were redocketed in the county each year.

In response to questions from Commission members, Mark Goodpaster, Senior Fiscal Analyst from the Legislative Services Agency (LSA) Office of Fiscal and Management Analysis, said redocketing fees were included as part of court fees in Indiana approximately 20 years ago. He said he would research the history of these fees and would provide Commission members with additional information.

Judge Zore stated he recalled previous redocketing fees were set so low that they were "not worth the effort" to collect them.

Sen. Bray then said he was reluctant to add more court costs, but this was a problem that needed a solution. He said the Commission would continue to study the Marion County request and the information provided by Mr. Goodpaster but would take no action concerning this issue at this time.

The next person to testify was Judge David Avery of the Allen Superior Court. Judge Avery stated the Alternative Dispute Resolution Committee of the Judicial Conference of Indiana supported expanding the private judge statute to allow all former judicial office holders, including appellate judges and Supreme Court justices, to serve as private judges. He said the Committee also supported expanding the types of cases private judges could hear to include domestic relations cases.

In response to questions from Commission members, Chief Justice Shepard stated he believed allowing former city and town court judges to also serve as private judges would not cause any problems since current law limited private judges to hearing only cases the judges could have heard while on the bench.

The Commission then discussed preliminary draft of legislation PD 3425-2009 (Handout #2) concerning private judges. (PD 3425 would allow former holders of a judicial office who served at least four consecutive years as a judge or justice to serve as private judges and would allow domestic relations cases to be assigned to private judges. Current law allows only former judges of circuit, superior, criminal, probate, municipal, or county courts to serve as private judges.)

The Commission voted 9 to 0 (show of hands) to recommend passage of PD 3425.

The next person to testify was Mike Pagano, Lake Superior Court Magistrate. Mr. Pagano stated he was appearing in his capacity as a member of the Special Courts Committee of the Judicial Conference of Indiana (Committee) to support legislation requiring that all city and town court judges be trained in the law.

Mr. Pagano said the Committee has been dealing with a number of court-structure issues, but there was one issue that had complete unanimity. He said that issue was the concept that every judicial officer in Indiana should be a lawyer. He said this view is shared by an overwhelming majority of the judges that sit in Indiana courts of record. Mr. Pagano stated the primary purpose for doing this is to improve the public perception and confidence in the

judiciary.

Mr. Pagano continued by stating there are 75 city and town courts in Indiana. He said all 10 of the city and town courts in Lake County are already required by statute to have judges that have been admitted to the practice of law and nine other city and town courts in Indiana are specifically required to have lawyers as judges. He stated the remaining 56 city and town court benches are not required to be filled by lawyers. He said 35 of these city and town courts in 26 counties currently have lay judges.

Mr. Pagano stated even a judge in a court of limited jurisdiction needs to know about the areas of law over which they do not have jurisdiction to be able to identify a case that has come before them improperly.

Mr. Pagano said he did not want to impugn the character or the wisdom of those lay judges that sit on city and town benches and he had no doubt they do their utmost to provide our citizens with fairness and with justice. However, he continued by stating the Indiana Constitution requires that any person charged with a crime be represented by someone who has graduated from law school and passed the bar exam and an ethics review. He said there are laws that make it a crime for anyone to practice law who has not met these minimum requirements. Mr. Pagano also stated it's the constitutional duty of the judiciary to interpret the law. He then asked in light of all of this, does it make sense to have this duty carried out by a person who has not been trained in the law?

In response to questions from Commission members, Mr. Pagano said he did not know of any specific complaints concerning the performance of lay judges.

The next person to testify was Judge Ken Pierce of the Jeffersonville City Court. He stated his concern with requiring all city and town court judges to be attorneys was that city and town judgeships paid so little it might be difficult to find attorneys to fill all of them. He said if a city or town court ceased operation in a county, the caseload of the circuit or superior court in that county would then increase.

Judge Pierce continued by stating a city or town court judge did need to be an attorney or have experience in the law. However, he stated that while he was an attorney, he had recently met several lay judges with 10 to 20 years of experience who knew more about certain issues than he did.

Judge Pierce concluded by stating that if the General Assembly was going to require city and town court judges to be licensed attorneys, all the current lay judges should be "grandfathered" in and allowed to continue to serve as long as they wished.

The next person to testify was Judge Roger Huizenga of the Walkerton Town Court. Judge Huizenga said he handled 3,000 to 4,000 infraction violations every year. He said city and town courts were "the first line of defense" in the judicial system.

Judge Huizenga continued by stating it was hard to find attorneys to run for these judgeships. He said Walkerton, like many other towns, did not have an attorney living in the area.

Judge Huizenga also stated city and town courts reduced the caseloads on other courts in the county. He stated these courts also provide revenue for cities and towns. Judge Huizenga concluded by stating the current law should not be changed.

In response to questions from Commission members, Judge Huizenga said his salary and

his clerk's salary added up to about \$27,000 per year.

The next person to testify was Jodie Woods, General Counsel of the Indiana Association of Cities and Towns. Ms. Woods distributed a map (Handout #3) to the Commission indicating the location of those city and town courts in Indiana that do not require their judges to be licensed attorneys. She also distributed a letter (Handout #4) to the Commission signed by the members of the Walkerton Town Council asking that legislation not be passed requiring all city and town court judges to be licensed attorneys.

Ms. Woods said she believed this was a Home Rule issue and should be left up to the local electorate of cities and town to decide. She stated not all cities and towns have an attorney who could serve as a judge.

In response to questions from Commission members, Ms. Woods stated city court judges had to be residents of the city. She said if there was no licensed attorney residing in a city, a city court could not operate there if the judge was required to be a licensed attorney.

The next person to testify was Judge David Weckerly of the Delphi City Court. Judge Weckerly said he was a former Delphi police officer and had worked for 35 years in the Delphi Community School Corporation.

Judge Weckerly said he was a part-time city court judge and received approximately \$2,500 per year in salary. He said he doubted any attorney would want to work part-time for that much money. He also said he found it interesting that the Indiana State Bar Association did not have a position on this issue. Judge Weckerly concluded by asking "if the system is not broken, why fix it?"

Chief Justice Shepard then stated that this recommendation to require all city and town court judges to be licensed attorneys was the product of judges who hear cases that come out of city and town courts. He said the interest of office holders was not important but the effect city and town courts have on citizens is important.

Chief Justice Shepard also said whether cities and towns make a profit from these courts is not important either. He said the most important consideration is whether citizens get what they need in their first instance of dealing with the judicial system. He said a citizen's initial experience in a city or town court can shape their future and what might start off as a modest violation could become more serious. He concluded by stating that while this was not an emergency, the State should move in the direction of requiring all these judges to be licensed attorneys.

Sen. Lanane stated the ideal situation would be that all these judges were licensed attorneys. However, he said he had heard only anecdotal evidence that there was a problem with the current city and town court system. He stated he was not comfortable with making any statutory changes at this time.

Rep. Dvorak stated he agreed with Sen. Lanane. He said he needed to hear more testimony concerning serious problems with the system before making any changes to the current law.

The Commission then discussed PD 3424-2009 (Handout #5) concerning city and town court judges. (PD 3424 would require the judge of a city or town court to be an attorney in good standing admitted to the practice of law in Indiana and allow a person who is a judge of a city or town court serving on June 30, 2009, and not an attorney in good standing admitted to the practice of law in Indiana to continue to serve only for the remainder of the

person's term.)

Upon a motion made by Chief Justice Shepard, the Commission amended PD 3424 to remove any residency requirements for city and town court judges and allow current city and town court judges to continue to serve as judges and run for election as judges after June 30, 2009.

The Commission then failed to recommend the passage of PD 3424 by a vote of 6 to 3 (show of hands). (Legislative Council Resolution 08-02, SECTION 11 states "a study committee may not recommend a final bill draft, or a final report, unless that draft or report has been approved by a majority of the voting members appointed to serve on that committee." Since the Commission has 13 voting members, it takes an affirmative vote of at least seven members to satisfy this requirement.)

The next person to testify was Linda Brady, Monroe Circuit Court Chief Probation Officer. Ms. Brady described certain services furnished by Alcohol and Drug Service Programs that can't be provided to persons who may benefit from them because the persons have not been charged with or convicted of a misdemeanor or felony as required under current law. Ms. Brady asked the Commission to consider expanding the provision of services under the current law.

In response to questions from Commission members, Jane Seigel, Executive Director of the Indiana Judicial Center, stated the Court Alcohol and Drug Program Advisory Committee of the Indiana Judicial Conference also endorsed expanding the coverage of Alcohol and Drug Service Programs.

The Commission then considered PD 3426-2009 (Handout #6) concerning Alcohol and Drug Service Programs. (PD 3426 would allow a person to participate in a court established Alcohol and Drug Service Program if the person is arrested for a misdemeanor or felony or referred to the program by another court, a probation department, the Department of Correction, the Federal Bureau of Prisons, the Division of Mental Health and Addiction, a prosecuting attorney's office, or pretrial services.)

The Commission voted 9 to 0 (show of hands) to recommend passage of PD 3426.

Mark Goodpaster then distributed a memorandum (Handout #7) to Commission members that contained an overview of court fees and the revenue generated by court fees. Mr. Goodpaster stated he had prepared the memorandum in response to a request made by Sen. Bray at an earlier Commission meeting. In response to questions from Commission members, Mr. Goodpaster described how proceeds from each fee are apportioned by statute to state, county, and municipal units of government.

Sen. Bray then stated the Commission would consider several preliminary drafts of legislation based on topics discussed at previous Commission meetings.

The Commission first considered PD 3429-2009 (Handout #8) concerning the Automated Record Keeping Fee. (PD 3429 would provide that the amount of the Fee would be \$10 after June 30, 2009, and before July 1, 2013, and \$7 after June 30, 2013.)

The Commission voted 9 to 0 (show of hands) to recommend passage of PD 3429.

The Commission then considered PD 3019-2009 (Handout #9) concerning county courts. (PD 3019 would repeal the law concerning the establishment and operation of county courts. As of January 1, 2009, no county court will exist in Indiana.)

Upon motion of Chief Justice Shepard, the Commission amended PD 3019 to also remove references in the Indiana Code to defunct municipal courts.

The Commission voted 9 to 0 (show of hands) to recommend passage of PD 3019, as amended.

The Commission then considered PD 3334-2009 (Handout #10) concerning the Indiana Court of Appeals. (PD 3334 would establish the Sixth District of the Court of Appeals of Indiana as of January 1, 2010, and provide that the entire State constitutes the Sixth District.)

The Commission voted 9 to 0 (show of hands) to recommend passage of PD 3334.

The Commission then considered PD 3446-2009 (Handout #11) concerning the Lake Superior Court. (PD 3446 would provide for the four judges of the Lake Superior Court County Division to be nominated by the Lake County Superior Court Judicial Nominating Commission and appointed by the Governor and be subject to the question of retention or rejection by the Lake County electorate every six years. Current law provides that the judges of the Lake Superior Court County Division are elected by the electorate of Lake County every six years.)

The Commission voted 9 to 0 (show of hands) to recommend passage of PD 3446.

The Commission then considered PD 3427-2009 concerning the Allen Circuit Court. (PD 3427 would allow the judge of the Allen Circuit Court to appoint a second full-time magistrate and remove the judge's authority to appoint a hearing officer who has the powers of a magistrate and whose salary is paid by the county.)

The Commission voted 9 to 0 (show of hands) to recommend passage of PD 3427.

Sen. Bray then moved that the Commission adopt the following recommendation concerning the selection of Superior Court judges in St. Joseph County:

"On the basis of the testimony received and the long positive history of merit selection of St. Joseph Superior Court judges, the Commission on Courts believes that St. Joseph Superior Court judges should continue to be selected as provided by current law, subject to periodic retention votes, again as provided by current law. It is clear to the Commission that the current system has attracted outstanding lawyers to seek and assume judicial careers and has provided those men and women with the ability to rule in a fair and impartial manner without fear of partisan retaliation for their decisions. At the same time, the system holds them accountable to the people of their community for their professional and personal behavior.

In calling on the General Assembly to provide for the merit selection of judges, Governor Roger Branigan in 1964 said that the State should "offer to the judges ... the promise of reasonable tenure if they perform well, and which will insure them, to the fullest extent possible, freedom from political pressures." The Indiana Commission on Courts believes that the current system for selecting and retaining St. Joseph Superior Court judges achieves that objective and should not be changed in any way."

After a brief discussion, the Commission voted 7 to 2* (show of hands) to adopt the motion. At the request of Rep. Dvorak, who voted against the motion, Sen. Bray stated

Rep. Dvorak could include a minority statement on this issue in the Commission's Final Report. (*The initial vote was 8 to 1 with Rep. Lawson originally voting "yes." Rep. Lawson later moved to change her vote to "no" and the Commission members approved the change by consent before the meeting was adjourned.)

The Commission then voted 9 to 0 (show of hands) to recommend that the LSA and the Indiana State Bar Association should continue to discuss how to deal with issues concerning noncode provisions of the Indiana Code and, if necessary, the LSA should make recommendations to the General Assembly concerning the use of noncode provisions.

The Commission then voted 9 to 0 (show of hands) to recommend that the General Assembly should defer action concerning Trial Rule 60.5 that allows courts to mandate the expenditure of funds by local governments while the Supreme Court continues to respond to this issue through the adoption of rules.

The Commission then voted 8 to 0 with one abstention (show of hands) to commend the Division of State Court Administration on the creation of the retention election website.

Sen. Bray then asked that the Commission approve the 2008 Final Report of the Commission, which includes a summary of the work program of the Commission during the 2008 interim plus findings and recommendations made by the Commission. The Commission voted 8 to 1 (show of hands roll call) to approve the 2008 Final Report of the Commission.

Sen. Bray adjourned the meeting at 4:29 P.M.